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**UNITED STATES DISTRICT COURT**  
**SOUTHERN DISTRICT OF NEW YORK**

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**JULIE KELLY, as General Manager of THE NEW  
YORK-NEW JERSEY REGIONAL JOINT BOARD,  
WORKERS UNITED, A/W SEIU, and its subordinate  
bodies Local 340 and Local 25**

**Plaintiffs,**

**Case No.**  
**15-cv-05117 (CM)**

**- against -**

**MARK GASTON PEARCE, as Chairman and  
Member, and KENT HIROZAWA, PHILIP  
MISCIMARRA, HARRY JOHNSON, III, and  
LAUREN MCFERRAN as Members of the  
NATIONAL LABOR RELATIONS BOARD**

**Defendants.**

-----X

**MEMORANDUM OF LAW IN OPPOSITION TO  
DEFENDANTS' MOTION TO DISMISS AND IN REPLY  
TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION**

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## **INTRODUCTION**

Plaintiff Julie Kelly, in her capacity as the General Manager of the New York-New Jersey Regional Joint Board, Workers United, A/W SEIU, (herein, the “Union” or “Joint Board”), submits this Opposition to the Motion to Dismiss of the National Labor Relations Board (herein, the “NLRB” or the “Board”) and in Reply to the NLRB’s Opposition to Kelly’s Motion for a Preliminary Injunction.

After Kelly filed her Motion, the NLRB issued an Order denying the Joint Board’s Request for Review of the Regional Director’s Decision on Unit Clarification Petition. The Order does correct the most egregious flaw in the Regional Director’s Decision requiring the Joint Board to seek an election to represent the employees of the Brooks Brothers (herein, the “Employer”) store at 1180 Madison Avenue in New York.

Nevertheless, the Motion to Dismiss should be denied and the Order in the Unit Clarification vacated because the decision and underlying proceeding was still an instance of the the Board acting outside the scope of its delegated powers and in violation of a mandatory statutory prohibition of Section 8(d) of the National Labor Relations Act (herein, the “NLRA” or “Act”). By processing the unit clarification petition of the Employer, conducting a hearing, and issuing a decision, the Board nullified the “after acquired store” clause in the parties collective bargaining agreement, (the “CBA”), by rendering meaningless the Employer’s statutory waiver of the right to use the Board’s election process, which compelled a concession by the Joint Board. The concession nullified the Joint Board’s right to speedy resolution of its dispute by arbitration and enforcement by a federal court and its right to have any disputes regarding the legality of the arbitration award adjudicated in an adversary proceeding under the Administrative Procedure Act, (the “APA”), 5 U.S.C. § 554, with all its attendant procedural safeguards,

including the right to appeal to the federal Court of Appeals. Because the NLRB processed the unit clarification proceeding, a non-adversary proceeding not subject to procedural requirements of the APA, the Joint Board has no meaningful way to vindicate its statutory rights.

### **FACTS**

On September 21, 2015, the NLRB issued an Order denying the Joint Board's Request for Review of the the Regional Director's Decision on Unit Clarification Petition. (Murray Supp. Decl. ¶ 3, Ex. E.) In a footnote to its one sentence order, the NLRB stated that the Order "does not preclude the Unions from seeking to include these employees in the current bargaining units . . . through a showing of majority status via card of majority status pursuant to an additional stores contractual provision . . . ." (Murray Supp. Decl. ¶ 3, Ex. E.)

On September 24, 2015, the Joint Board filed a demand for arbitration to demonstrate majority support among the employees of the Employer's store at 1180 Madison Avenue. (Murray Supp. Decl. ¶ 4.)

### **ARGUMENT**

Because the NLRB has corrected the most obvious error in the Regional Director's Decision, which stated the Union could represent the employees through a Board election, and the Joint Board has now filed for arbitration to demonstrate its majority support, the main issue with regard to the Motion for Preliminary Injunction has been corrected, although not without considerable damage to the Joint Board and the employees of the Employer at 1180 Madison Avenue. However, by entertaining the unit clarification petition, holding a hearing and issuing a

decision, the NLRB has still unlawfully compelled a concession by the Joint Board that nullifies the Employer's agreement to waive its right to a Board election in the CBA.

There is no dispute about the standards for determining whether this Court has jurisdiction "to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act." Leedom v. Kyne, 358 U.S. 184, 188 (1958). "Only where the Board has clearly violated an express provision of the statute and the plaintiff has no means of obtaining review through a refusal to bargain, have the courts granted relief under Kyne." Hartz Mountain Corp. v. Dotson, 727 F.2d 1308, 1312 (D.C. Cir. 1984)(citing II THE DEVELOPING LABOR LAW 1716-18 (C. Morris ed., 2d ed. 1983)). The Board's unit clarification order here satisfies both of those requirements.

## POINT I

### **THE JOINT BOARD HAS NO MEANS TO OBTAIN JUDICIAL REVIEW OF THE NLRB'S UNIT CLARIFICATION ORDER**

There can be no dispute here that the Joint Board has no reasonable means to obtain review of the NLRB's unit clarification order, as the Board here concedes in its Brief. (NLRB Brief, pp. 5-8.) The only means a losing party in a representation proceeding has to obtain court review is pursuant to a later, unfair labor practice determination, such as through a refusal to bargain case. Id. This procedure is not available to a union. See Miami Newspaper Printing Pressmen's Union v. McCulloch, 322 F.2d 993, 997, n. 7 (D.C. Cir. 1963); see also Schwarz Partners Packaging, LLC v. N.L.R.B., 12 F. Supp. 3d 73, 84 (D.D.C. 2014).

A union can engage in recognitional picketing in violation of Section 8(b)(7)(B) of the Act, 29 U.S.C. §158(b)(7)(B), thus provoking an unfair labor practice charge by an employer, which could result in a final order in an unfair labor practice case reviewable in court. See

United Federation of College Teachers v. Miller, 479 F.2d 1074, 1079 (2d Cir. 1973). However, the Joint Board is covered by a broad no strike clause in the CBA, which also prohibits it from picketing. (Kaplan Aff. ¶ 3, Ex. A, p. 23.) Because the Joint Board would arguably violate the CBA, as well as the law, if it engaged in picketing at the 1180 Madison Avenue store, the Employer could obtain an injunction against the Joint Board enjoining such picketing, pending the outcome of the arbitration the Joint Board has filed, rather than file an unfair labor practice charge. Boys Markets, Inc. v. Retail Clerk's Union, 398 U.S. 235, 254 (U.S. 1970). Indeed, because a federal court would issue an injunction much more quickly than could the NLRB, and because the Employer here would be loath to give the Union an opportunity to challenge an obviously flawed NLRB decision in the court of appeals, the Employer would have an extremely strong motive to file the injunction rather than an unfair labor practice charge.

The Board's argument that the Union's unfair labor practice charge gives it an alternate means of review sufficient to escape the application of the Leedom exception is wrong. First, it would in no way address the underlying unlawfulness of the Board's having processed the unit clarification petition and issuance of an order in the first instance.

Second, even with respect to the Joint Board's initial argument that it compelled it to seek an election to represent the employees, the alternate form of review has to be reasonable. When the Court in Leedom asserted jurisdiction because the employer had no reasonable means of review, it obviously meant it had no means of review from a federal court, not the NLRB itself. Here, the Joint Board filed an unfair labor practice charge for two reasons. First, the NLRB advised it to do so and stated it would entertain such a charge. (Murray Supp. Decl. ¶ 5.) It is understandable why the NLRB made this suggestion, as doing so support the arguments it intended to make in this Motion to Dismiss. Secondly, however, the Joint Board was intending



to file a charge because the Employer unlawfully interrogated employees and unilaterally changed the terms and conditions of employment after the Joint Board demanded recognition based on majority support by cutting sales employees' compensation up to 25%, thereby undermining support for the Union. (Murray Decl ¶ 6.)

Thus, the second prong of the Leedom exception is indisputably met here, giving the Court jurisdiction of this matter.

## POINT II

### **THE NLRB EXCEEDED ITS STATUTORY AUTHORITY BY PROCESSING A UNIT CLARIFICATION PETITION BECAUSE IT NULLIFIED IMPORTANT RIGHTS IMPLICIT IN THE STATUTORY WAIVER CONTAINED IN THE PARTIES' CBA**

The “after acquired stores” clause in the CBA is a “contractual commitment[] by the Employer to forgo its right to resort to the use of the Board's election process in determining the Unions' representation status in these new stores.” Houston Div. of the Kroger Co. (“Kroger”), 219 NLRB 388, 389 (1975)(emphasis added). Not only does an employer waive its right to demand an election with regard to an “after acquired stores clause, it also waives its right to have the NLRB process a representation petition. See Central Parking Systems, Inc. 335 N.L.R.B. 390, 391 (2001). There, the NLRB held that, where there are issues of contract interpretation concerning the “after acquired stores” clause, an arbitrator should decide those questions and the representation petition should be dismissed. Id. Thus, these clauses are not only a waiver of the Employer's right to demand an election, but implicit in the Board's use of the word “process” in its decision in Kroger is the waiver of the Employer's right to use the hearing processes, including decisions by the Board on unit determinations, in a representation proceeding.

**A. After Acquired Stores Clauses Implicitly Affords the Joint Board the Right to Have Accretion and Unit Placement Issues Heard in an Unfair Labor Practice Hearing**

An implicit, and essential, right a union obtains from an “after acquired stores” clause is that any statutory issues that may arise under the National Labor Relations Act (the “Act” or “NLRA”) are heard in an unfair labor practice case. This right is implicit because the “Board generally dismisses unit clarification petitions submitted during the term of a collective-bargaining agreement where the contract clearly defines the bargaining unit.” Sunoco, Inc., 347 N.L.R.B. 421, 422 (2006)(citing Wallace-Murray Corp., 192 NLRB 1090 (1971)).

“Notwithstanding this general rule, the Board recognizes a limited exception in cases where parties cannot agree on whether to include or exclude a disputed classification ‘but do not wish to press the issue at the expense of reaching an agreement.’” Id. (citation omitted). With regard to that one exception, not applicable here, “the Board will process a unit clarification petition filed ‘shortly after’ the contract is executed so long as the party filing the petition did not abandon its position in exchange for bargaining concessions.” Id. (citation omitted). “The Board’s rule is based on the rationale that to entertain a petition for unit clarification during the midterm of a contract which clearly defines the bargaining unit would disrupt the parties’ collective-bargaining relationship.” Edison Sault Electric Co., 313 N.L.R.B. 753, 753 (1994). Here, the CBA clearly defines the bargaining unit, and the unit clarification proceeding has seriously disrupted the bargaining relationship. Thus, the Employer had no statutory right to proceed with a unit clarification petition and, therefore, the Joint Board had no reason to bargain for such a waiver.

Where the NLRB has entertained mid-term unit clarification petitions involving accretion of new facilities that were challenged by employers in unfair labor practice cases brought about

by a refusal of the employers to comply with unit clarification determinations, the courts of appeals have refused to enforce the NLRB orders. See Stanford Hosp. & Clinics v. NLRB, 370 F.3d 1210, 1214 (D.C. Cir. 2004) (“We conclude the order accreting the 11 housekeepers at the CCSR was arbitrary and capricious because it contravened the Board's established policy against entertaining a petition for unit clarification where the bargaining unit is ‘clearly defined’ in the CBA.”); Consolidated Papers, Inc. v. NLRB, 670 F.2d 754, 757 (7th Cir. 1982). In Consolidated Papers, the court said

In the instant case, we do not reach the question whether the Board erred in concluding that the CSRs share a community of interest with unit employees sufficient to justify an accretion. We believe that the Board failed to adhere to its own precedent, which articulates a policy not to entertain unit clarification petitions in circumstances such as those presented here. Expressing no opinion on the wisdom of the policy, we limit our inquiry to the fairness of the Board's application of that policy in the instant case.

670 F.2d at 757. The only salient fact that distinguishes Stanford Hospital and Consolidated Papers from this case is that, in those cases, the aggrieved parties were employers who could refuse to comply with the NLRB's order and, thus, achieve judicial review. Since the Joint Board is a union, it has no avenue to seek judicial review of this case, which a court of appeals would almost certainly not enforce.

Thus, one of the most important rights that a union obtains by securing an employer's statutory waiver of the right to petition for an election is that it does not find itself in the procedural trap the Joint Board is now in as a result of the Board's denial of its Request for Review, unable to seek the review of the Board's order by the courts of appeal. Thus, by processing the unit clarification petition, the Board has permitted the Employer to escape the consequences of its statutory waiver and indirectly compelled the Joint Board to forgo the right to review by a court of appeals otherwise guaranteed by the Employer's waiver. Thus, the

NLRB's unit clarification order "violates the mandatory and unambiguous provisions of Section 8(d) of the Act" because it indirectly compels a concession concerning "the substantive terms of" the CBA. H. K. Porter Co. v. N.L.R.B., 397 U.S. 99, 106 (1970).

Here, by processing the unit clarification petition, the NLRB rendered the "after acquired stores" clause meaningless with regard to another important and substantial contractual right. An unfair labor practice proceeding is an adversary proceeding covered by the APA and its due process safeguards, while a representation proceeding is not subject to the APA. The Board has explained the distinction as follows:

The procedure for a "C" case, [an unfair labor practice case] which the General Counsel prosecutes under Section 10 of the Act, is adversary in nature. By contrast, the Regional Director, as the Board's agent, processes an "R" case, [a representation case], as investigative and nonadversary under Section 9 of the Act. . . . And the field manual for the Boards's regional offices explicitly provides in Section 11422, [14] at 188, that hearings on objections are not adversary. 2 NLRB Casehandling Manual (April 1984). Thus the first paragraph states: 11422 Nature and Objective: A hearing on objections/challenges is a formal proceeding designed to elicit information on the basis of which the Regional Directors or Board may discharge their/its duties under Section 9 of the Act. As such, insofar as the Government is concerned, it is investigatory and not adversary.

Because "C" cases are adversary and adjudicative, they are subject to the Administrative Procedure Act (APA). On the other, as "R" cases are merely investigative and nonadversary, they are exempt from the APA's provisions.

Fruehauf Corporation, 274 N.L.R.B. 403, 405 (1985)(citation omitted).

Under the APA, "[a] party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." 5 USCS § 556(d). At the unit clarification hearing, the Regional Director denied enforcement of the Joint Board's subpoena of critical documents which she had earlier ruled were relevant, specifically, emails in the

possession of the Employer. (Murray Decl. ¶ 10.) It is undisputed that the at least one of the Employer's witnesses, David Warren, deleted emails the Joint Board subpoenaed one month after the subpoena issued. (Murray Decl. ¶ 11, Ex. D.) The Employer produced almost no emails from the relevant period in the dispute. Despite this deliberate destruction of evidence, the NLRB ruled that the Employer made good faith efforts to comply with the Joint Board's subpoenas. (Murray Decl. ¶ 10, Ex. D.)

Had the NLRB dismissed the unit clarification petition, and proceeded with the unfair labor practice charges, it likely would have dismissed the Employer's charges for non-cooperation if the Employer advised them that it destroyed so many relevant documents. If the NLRB, despite the destruction of evidence, filed a complaint against the Joint Board, the Joint Board would at least have had the procedural protections of the APA and the benefit of a neutral administrative law judge, who would likely have been observant of the due process rights of the Joint Board and less likely to tolerate such flagrant spoliation of evidence.

Indeed, no federal judge would ever tolerate such a flagrant violation of the obligations of a litigant to comply with a subpoena of relevant documents. In Ozark Auto. Distribs. v. NLRB, 779 F.3d 576, 585 (D.C. Cir. 2015), a case decided after the Regional Director's decision issued, the court vacated a Board order in a representation case because the Board's quashing of an employer's subpoena's was prejudicial error. The court found that the failure to produce relevant documents is prejudicial because there could be no certainty "what the [subpoenaed] documents would have revealed if" they had been produced. 779 F.3d at 585. One of the ways the court identified that the employer in Ozark Auto was prejudiced was that it was deprived of the incentive of a hostile witness to testify truthfully. It said:

As experienced trial attorneys know, when a hostile witness realizes that examining counsel has information bearing on the answers to counsel's questions,

the witness tends to be more candid. Here, the company was deprived of this incentive for truthful and complete testimony.

Id. Here, nearly all the witnesses the Union called were hostile witnesses as it was an accretion case and the evidence was almost entirely in the control and possession of Employer agents. Thus, the Union was prejudiced in that it was deprived of the incentive that the Employer's agents would testify truthfully and completely. In Ozark Auto, as with Stanford Hospital and Consolidated Papers, the only salient facts that distinguishes this case from it is that the aggrieved party there was an employer, not a union, and that could refuse to comply with the NLRB's order and, thus, achieve judicial review.

The Board's denial of the Joint Board's Request for Review asserted that its decision did not preclude the Joint Board from enforcing its contractual "after acquired store" clause, thus appearing to preserve the integrity of that provision. Nevertheless, as stated above, by proceeding to hear this case through a unit clarification proceeding, the Board implicitly undermined some of its most essential features. "But the Board may not attempt, as it has done here, to accomplish this result through a process of statutory construction which purports to uphold the legality of "additional store clauses" while silently nullifying them." Retail Clerks International Assoc. v. NLRB, 510 F.2d 802, 807 (D.C. Cir. 1975).

**B. The NLRB Unlawfully Compelled a Concession by the Joint Board by Interpreting the Waiver Contained in the After Acquired Stores Clause to be Inapplicable to Unit Clarification Petitions**

The NLRB rejected the Joint Board's waiver argument because there had "been no explicit agreement by the parties to submit unit issues to an arbitrator . . ." (Murray Decl., ¶ 6, Ex. A, RD Dec., p. 38.) The Joint Board admits that there was no explicit agreement to submit unit issues to the arbitrator, arguing below that it is implied in the CBA. The primary issue is

that the Union had the right to enforce the “after acquired stores” clause before the arbitrator. The Board should have entertained the dispute regarding whether the arbitrator’s award was unlawful because of the absence of accretion through the processing of the unfair labor practice charges, not the unit clarification petition. There was absolutely no ambiguity in the recognition clause and, thus, nothing to be clarified. Unit placement and accretion issues often are decided by the NLRB in the context of unfair labor practice cases, rather than representation or unit clarification hearings. See e.g. Lockheed Martin Tactical Aircraft Systems, 331 N.L.R.B. 1407, 1407 (2000). In this case, the Board elected to hold the unfair labor practice cases in abeyance and decide the unit placement and accretion issues in a unit clarification proceeding.

The NLRB’s rejection of the Joint Board’s waiver argument is based on its interpretation of the parties’ CBA. “The Board's argument to the extent it relies on contract interpretation alone, and not enunciation of policy, is entitled to no particular deference.” Retail Clerks, 510 F.2d at 805. The Supreme Court has very clearly stated that the federal courts owe no deference to the NLRB’s interpretation of collective bargaining agreements. Litton Fin. Printing Div. v. NLRB, 111 S. Ct. 2215, 2223 (U.S. 1991). “Arbitrators and courts are still the principal sources of contract interpretation.” Id. For this reason, this Court is empowered to determine the extent of the parties’ waiver and determine whether the NLRB’s unit clarification order narrowly construing the waiver resulted in the Board improperly compelling a concession whereby the Joint Board was forced to participate in a representation hearing and give up the right to judicial review.

“Where, as here, the parties clearly intend to enter into a binding agreement, the courts can and should imply incidental terms necessary to effectuate the contract's purposes.” Hotel Employees, Restaurant Employees Union, Local 2 v. Marriott Corp., 961 F.2d 1464, 1467 (9th

Cir. Cal. 1992)(citation omitted). Implicit in the parties' agreement here that the Employer waive its right to Board election processes is that it also waived the right to subject the Joint Board to a protracted representation hearing that could result in the Joint Board having no recourse to a judicial determination of the correctness of the NLRB's decision. "The jurisdiction of the NLRB over representation matters does not preclude private agreements concerning the same issues, and a court may use its concurrent [Labor Management Relations Act] § 301(a) jurisdiction to enforce arbitration clauses appearing in such contracts." Hotel & Restaurant Employees Union Local 217 v. J.P. Morgan Hotel, 996 F.2d 561, 568 (2d Cir. 1993). There, in determining that the court had jurisdiction over the private agreement regarding representation matters, the court said "it is of significance that in the contract before us there is a provision that disputes concerning the contract's application or interpretation were to be submitted to arbitration." Id. at 567.

In the CBA here, the parties reached a private agreement concerning representational matters that is contained in a binding agreement that includes the arbitration of contract disputes. Indeed, the parties have twice submitted representational disputes to arbitrators, and is in the process of arbitrating a third representational dispute. Thus, the Court here should imply that one of the essential terms of the parties' agreement is the speedy resolution of disputes through arbitration, in addition to implying that the statutory waiver implies that the Joint Board would not be dragged into a unit clarification hearing that would take in excess of four years to come to a conclusion. By rejecting the Joint Board's waiver argument, the NLRB has impermissibly compelled it to forgo the speedy resolution of its grievances through arbitration and litigate its dispute in a forum the parties agreed to avoid. See Abernathy v. Southern California Edison, 885 F.2d 525, 529 (9th Cir. Nev. 1989)("There, the parties may be deprived of one of the principal



benefits of the bargained-for arbitration process -- a speedy and efficient dispute resolution procedure -- and may be compelled to litigate the merits of their dispute in a forum they agreed to avoid.”).

As argued above in Point II, the Court should also imply that one of the “terms necessary to effectuate the contract's purposes,” Marriott Corp., 961 F.2d at 1467, is that the statutory waiver was intended to permit the Joint Board to avoid the statutory trap of being unable to seek appellate court review of an NLRB determination. In negotiating the waiver, the Joint Board had a right to believe that it would not be subject to a unit clarification since courts of appeals and the NLRB itself have consistently held that unit clarification petitions will be dismissed when they filed during the mid-term of a contract.<sup>1</sup> In deciding that Section 301 is to be governed exclusively by federal law, the Supreme Court was careful to explain that federal, not state law, governed because the “possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.” Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Lucas Flour Co., 369 U.S. 95, 103 (1962). The same concerns are at issue here. If the NLRB’s decision to conduct the unit clarification proceeding is permitted to stand, then “neither party could be certain of the rights which it had obtained or conceded, [and] the process of negotiating an agreement [becomes] immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the

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<sup>1</sup> No-strike clauses are statutory waivers of a union’s right to strike. Litton, 501 US at 198. Thus, the NLRB’s policy of not permitting unit clarifications during the term of a CBA preserves unions’ rights to obtain judicial review by picketing.

contract.” Id. Here, the two systems of law are not state and federal. Rather, the same law applies differently depending on whether a union or employer is successful in the proceeding.

The NLRB’s reliance on Boire v. Greyhound Corp., 376 U.S. 473, 478 (1964) for the proposition that Congress intended to impose such delays as the Joint Board has experienced here is seriously misplaced. Congress was concerned, in passing the indirect method of review, that employers would be able to drag out proceedings in order to damage the bargaining strength and support for the union. It said

When an employee organization has built up its membership to a point where it is entitled to be recognized as the representative of the employees for collective bargaining, and the employer refuses to accord such recognition, the union, unless an election can promptly be held to determine the choice of representation, runs the risk of impairment of strength by attrition and delay while the case is dragging on through the courts, or else is forced to call a strike to achieve recognition by its own economic power.

Id. Congress was clearly concerned that employers not be permitted to drag out election challenges. There is nothing to suggest that Congress intended to prejudice unions from having judicial review after the NLRB takes four years to reach a determination, especially when the parties reached a private agreement to deal with these disputes through arbitration.

Finally, the Court should not defer to the NLRB’s holding that the Employer did not waive its right to avail itself of the representation processes of the NLRB because the parties did not explicitly agree to submit unit issues to the arbitrator. In Retail Clerks, the court rejected the NLRB’s holding that an after acquired store clause that did not set forth a specific recognition procedure was not a statutory waiver. The court said

The Board's opinion in the Kroger case suggests that an "additional store clause" would be permissible if it specifically described a recognition procedure other than a Board ordered election. But this simply restates the question. What ambiguity is there in the present clauses which suggests that present clauses do not specify that some, indeed, any method other than a Board ordered election of recognition is agreeable to the parties?

Retail Clerks, 510 F.2d at 805. On remand, the NLRB reversed itself and issued the Kroger decision that held that “after acquired store” clauses operate as statutory waivers by Employers of the “right to resort to the use of the Board's election process in determining the Unions' representation status in . . . new stores.” 219 NLRB at 389. Here, the NLRB's interpretation of the parties' CBA as not constituting a waiver of the Employer's right to avail itself of the Board's representation processes is in conflict with the holding of Retail Clerks.

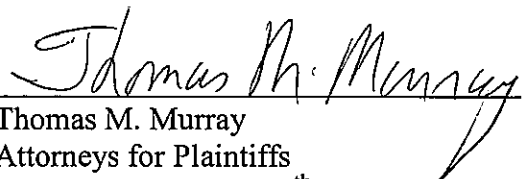
The NLRB's order, thus, unlawfully compels a concession by the Joint Board. Accordingly, the first prong of the Leedom standard is met.

### **CONCLUSION**

For all of the above reasons, the Court should assert jurisdiction in this matter, deny the NLRB's motion to dismiss and vacate the NLRB's Order in the unit clarification proceeding.

Dated: New York, New York  
October 5, 2015

Respectfully submitted,  
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